

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

CHARLES E. SMITH, et al, Plaintiffs

v.

No. 4:96CV69-EMB

BARNEY LUTHER, et al, Defendants

O P I N I O N

Plaintiffs bring this cause of action pursuant to 42 U.S.C. §1983 and applicable state law asserting that the seizure of their automobile by defendant Barney Luther upon a warrant issued by defendant Mississippi Tax Commission violated their due process and equal protection rights; constituted an unreasonable search and seizure in violation of the Fourth Amendment; and violated state law.¹

Plaintiffs have moved for partial summary judgment on the grounds that Miss. Code Ann. §§27-7-57, 27-7-59 and 27-7-61 are unconstitutional under the Fourteenth Amendment, thereby

¹By Order dated August 14, 1996, District Judge Glen H. Davidson granted defendants' Motion to Dismiss in part, thereby dismissing plaintiffs' claims for money damages against the defendant Mississippi Tax Commission and Barney Luther in his official capacity. Plaintiffs' state law claims of false arrest and false imprisonment were also dismissed. What remains are plaintiffs' claims for injunctive relief and declaratory judgment against the Commission and Luther in his official capacity; the claim for damages against Luther in his individual capacity; and the state law claims for malicious prosecution and abuse of process.

invalidating the tax warrant obtained by the process established in those statutes; and that the tax warrant was facially invalid because it failed to describe with particularity the items to be seized.

Defendants oppose plaintiffs' motion and have filed a Cross-motion for Partial Summary Judgment on the ground that they acted pursuant to state law which is constitutionally valid and therefore the seizure of the plaintiffs vehicle did not violate the Constitution.

FACTS

The undisputed facts are that the plaintiffs filed a 1992 personal income tax return with the State Tax Commission which showed a tax liability of \$1,328.87. Plaintiffs did not remit funds to satisfy this liability. On October 29, 1993, the Commission mailed to the plaintiffs a notice of delinquency advising them that they had 30 days to contest the delinquency or pay the amount indicated. Exhibit A to Defendants' Cross-Motion. Plaintiffs did not respond to the notice within the time provided, and the Commission filed a notice of tax lien with the Bolivar County Circuit Clerk who enrolled the lien as a judgment on the county judgment roll. Exhibit B to Defendants' Cross-Motion. Pursuant to Miss. Code Ann §27-7-57, the Tax Commissioner issued a tax warrant on September 16, 1994 which directed any special agent of the Commission to "immediately seize and sell according to law the real and personal property of the said taxpayer found in your county, for the payment of said taxes, interest, and damages

together with all costs of executing this warrant." Exhibit C to Defendants' Cross-Motion. The vehicle was seized pursuant to Miss. Code Ann. §27-7-61, and the next day the plaintiffs paid the tax and the vehicle was returned to them. The points of contention are that the plaintiffs claim that they never received the notice advising them that their vehicle would be seized and that the warrant was unconstitutional, as is the Tax Commission procedure for issuing it.

DUE PROCESS

Plaintiffs argue that the statutes at issue do not provide for pre-deprivation notice and hearing. Additionally, plaintiffs argue that no judicial body is required to authorize the tax warrant.

Defendants argue that pre-deprivation notice was given by regular mail and that post-deprivation remedies exist which satisfy all due process requirements.

Plaintiffs contend that under no circumstances should their property have been seized without notice and a hearing, citing Fuentes v. Shevin, 407 U.S. 67 (1972). However, procedural due process is a flexible concept and "calls for such procedural protections as the situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Further, the private interest affected by the seizure must be examined in light of the government function involved. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895

(1961). The Court in McKesson Corp. v. Florida Alcohol & Tobacco Division, 496 U.S. 18, 37 (1990), a case cited by the plaintiffs, identified the "government's exceedingly strong interest in financial stability"² when it held that a state must provide procedural safeguards against an unlawful taxation, but that "it ... need not provide pre-deprivation process for the exaction of taxes," so long as a post-deprivation remedy is available.

An examination of the process afforded the plaintiffs against the back drop of this strong government interest convinces the court that all constitutional requirements of due process were met.

First, the plaintiffs submitted a income tax return which indicated a liability was owed. Although the parties have not attached to the motion papers a copy of the tax return, the court takes judicial notice that state income tax returns indicate that a check should accompany the return if money is owed. On October 29, 1993, the Commission sent the plaintiffs a notice of delinquency which requested payment in the amount of \$1,442.96 to be paid within 30 days. The notice provided that if the plaintiffs believed the assessment to be wrong they should call or write the

²"Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult." McKesson, at 37.

Commission immediately. The notice clearly set forth the actions which would follow if the plaintiffs took no action:

1. A Judgment will be recorded against you in the county of your residence, and a warrant will be issued for its collection.
2. If this is unsuccessful, garnishment proceedings will be instituted against your salary.
3. As a final action, the Commission may be required to disallow your homestead exemption application.

Plaintiffs contend that they did not receive this notice. Nonetheless, the Supreme Court has consistently held that notice by regular mail is sufficient due process to advise the party that their property rights are in jeopardy. Tulsa Professional Collec-tion Services, Inc. v. Pope, 485 U.S. 478, 490 (1988); Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983); Schroeder v. City of New York, 371 U.S. 208 (1962); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). See also Armendariz-Mata v. U.S. Department of Justice, 82 F.3d 679, 683 (5 Cir. 1996)("proper inquiry is not simply whether the government sent the notice, but whether it acted reasonably under all the circumstances in relying on the mail as a means to apprise the interested party of the pending action"). As the defendants note, the notice was mailed to plaintiffs' place of residence, according to the tax return, which was the same address where the plaintiffs were found at the time of the seizure. The court finds that under the circumstances, in mailing the notice to plaintiff's residence,

the Tax Commission acted reasonably to apprise plaintiffs of the actions which would be taken to execute on the recorded judgment.

Further, whether or not the plaintiffs received the actual notice, they cannot claim surprise at the adverse actions of the Tax Commission. "The well-known inevitability of taxes and the consequences of not paying them are themselves likely to alert a tax delinquent property owner to the possibility of [seizure]." Weigner v. City of New York, 852 F.2d 646 (2 Cir. 1988), cert. denied, 488 U.S. 1005 (1989). Thus, the court does not find that the plaintiffs were deprived of their property without notice.

The court further finds that sufficient post-deprivation remedies were offered to the plaintiffs pursuant to Miss. Code Ann. §27-3-29, which provides:

"Any person aggrieved by any assessment, order, decision or other act of the commission and/or the commissioner, . . . , may apply to the Board of Review of the Mississippi State Tax Commission by petition in writing for a hearing within ten (10) days after receiving notice of the adverse action."

The statute also provides that the final order of the commission may be appealed to the circuit or chancery court. Thus, the plaintiffs had the opportunity for a full hearing from which they could appeal to a judicial body, but opted instead to pay the tax liability and reclaim the seized automobile.

Plaintiffs' other constitutional issue with regard to the procedures employed by the Mississippi Tax Commission is

that no judicial body authorized the seizure. It has long been recognized that a government's practice of levying a tax lien by summary administrative proceedings does not violate constitutional principles of due process. Cheatham v. United States, 92 U.S. 85, 87 (1875); State Railroad Tax Cases, 92 U.S. 575, 614 (1875); Springer v. United States, 102 U.S. 586, 593 (1880); Phillips v. Commissioner, 283 U.S. 595 (1931).

"These officers [state tax collectors], and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the Constitutions of all the States, and by the theory of our English origin, is exclusively legislative."

State Railroad Tax Cases, supra at 614.

FOURTH AMENDMENT

Plaintiffs contend that the warrant itself does not describe the property to be seized in direct contravention of the Fourth Amendment which requires that every warrant "describe with particularity the items to be seized." This argument has been foreclosed by Murray v. Hoboken Land & Improvement Co., 59 U.S. 272, 285 (1855), which held that the Fourth Amendment has no application to a distress [tax] warrant which is not constitutionally invalid if it fails to meet the requirements thereof.

The court therefore finds that the Tax Commission statutes at issue do not violate the Due Process Clause, and the

warrant for and subsequent seizure of plaintiffs' automobile was valid.

A separate order, in accordance with this opinion, shall issue this day.

THIS, the 6th day of February, 1997.

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

CHARLES E. SMITH, et al, Plaintiffs

v.

No. 4:96CV69-EMB

BARNEY LUTHER, et al, Defendants

O R D E R

In accordance with an opinion entered this day, it
is hereby

ORDERED:

1. That plaintiffs' Motion for Partial Summary
Judgment be, and is hereby, denied.

2. That defendants' Cross Motion for Partial
Summary Judgment be, and is hereby, sustained. Count I of
plaintiffs' complaint, and Count III as to plaintiffs' claim that
the seizure of their automobile was unreasonable, are hereby
dismissed with prejudice.

SO ORDERED this, the 6th day of February, 1997.

UNITED STATES MAGISTRATE JUDGE